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IN THE

Supreme Court of the United States

October Term, 1962

No. 936

YALE TRANSPORT CORP.,

Appellant,

AGAINST

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Appellees.

JURISDICTIONAL STATEMENT

On Appeal From the Judgment of the United States District Court for the Southern District of New York

Herbert Burstein,
Attorney for Yale Transport Corp.,
No. 160 Broadway,
New York 38, N. Y.

Loder Appeal Press, Inc., 41 Vesey Street, New York, N. Y. WOrth 2-0689

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No. .....

YALE TRANSPORT CORP.,

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AGAINST

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Appellees.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant, Yale Transport Corp., (herein called "Yale") appeals from the judgment of the United States District Court for the Southern District of New York, entered on November 20, 1962, dismissing its complaint in an action to enjoin the enforcement of a final order of the Interstate Commerce Commission (herein called the "Commission") and respectfully submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented which merit review and decision by this Honorable Court.

Opinion Below

The opinion of the District Court is reported at —— F. Supp. —— (S. D. N. Y., 1962) and is annexed hereto as Appendix "A".

The Decision and Order of the Commission (Division 1), dated July 12, 1961 is annexed hereto as Appendix "B" and the Examiner's Report and Recommended Order is annexed hereto as Appendix "C".

Jurisdiction

This suit was instituted under the provisions of Title 28 U. S. C. Sections 1336, 1398, 2321-2325 and Title 5 U. S. C. Section 1009 to enjoin the enforcement of, and to vacate, an order of the Commission. The judgment of the District Court, dismissing the complaint, was entered on November 20, 1962 and a notice of appeal was filed on January 17, 1963. The jurisdiction of the Supreme Court to review the judgment by direct appeal is conferred by Title 28 U. S. C. Sections 1253 and 2101(b) and confirmed by the decisions of this Court (*United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 1952; *United States* v. *Capital Transit Company*, 352 U. S. 357, 1945).

Questions Presented

This appeal, which calls for the construction of Sections 207 and 208 of the Interstate Commerce Act, Part II (49 U. S. C. Sections 307, 308), presents questions which have never been submitted to this Court. A decision by the Supreme Court is urgently required because of the signifi-

cant legal and economic problems involved[1] and because of a plain conflict between the decision of the court below and decisions by other three-judge district courts. (*Michigan Motor Freight Lines, Inc., et al.* v. *United States, et al.*, 113 F. Supp. 812 (E. D. Mich. S. D., 1953); *Clarke* v. *United States*, 101 F. Supp. 587 (D. C. D. C., 1951); *Interstate Common Carrier Council of Maryland, Inc., et al.* v. *United States, et al.*, 84 F. Supp. 414 (D. Md., 1949).) To reach a definitive determination and to settle the conflict of decisions, the following issues must be resolved:

1. Where a motor carrier applicant seeks to amend a Certificate, issued under Section 207 of the Interstate Commerce Act, Part II (49 U. S. C. Section 307) by eliminating certain gateways (but without enlarging the scope of its authority) and the evidence of record shows that the applicant actively and consistently operates through circuitous gateways between the points involved and that substantial operating economies and safer and more efficient operations will ensue and where the opposing motor carriers, who appeared as protestants, failed to introduce any evidence as to their operations, may the Commission, in disregard of its own well established decisional precedents and without advance notice

[1] Recognizing the need for greater efficiency and economy of operations, the Commission adopted special rules governing alternate routes (*22 F. R. 4119*) and hundreds of applications have been processed because changing conditions and circumstances and waste and inefficiency created by uneconomic routes cost the nation millions of dollars annually. This problem engaged the attention of the Senate Committee on Small Business which condemned the Commission's restrictive policy (Sen. Rep. No. 1693, 84th Cong. 2d Sess. (1956). The principles applicable to alternate routes and gateway eliminations are identical. A substantial number of applications for authority to deviate from authorized routes are filed annually (75 I. C. C. Ann. Rep. 68, 1961).

to the applicant, deny the application because of a failure to adduce evidence which has never been required in any prior case? (*Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 91 [1953].)

2. Where the statute is silent as to the standards to be applied when an application to correct uneconomic operations is presented but the Commission has enunciated standards and guidelines which have been judicially sanctioned, may the Commission, at any time and without notice to an applicant, decline to apply the accepted standards to the evidence of record and justify this course of action by relying upon the principle that an administrative agency is not bound by precedent?

The Governing Statutes and Principles

The relevant statutory provisions are set forth in Appendix "D" to this statement. The decisive decisional principles which were applied by the Commission in *G. N. Childress-Elimination Sanford Gateway*, 61 M.C.C. 421, 428 (1952) to applications to eliminate oppressive gateway restrictions are these:

"(1) whether applicant is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with the existing carriers, and

(2) whether the elimination of the gateway requirement would enable applicant to institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers" (p. 428).

If an applicant meets the standards expressed in (1) above, then it is clear that relief must be granted:

> "* * * solely upon proof that the proposed operation would result in operating economies, which although primarily a benefit to the applicant, indirectly benefit the public through the medium of more efficient and economical service". (*G. N. Childress-Elimination Sanford Gateway, supra*, p. 428.)

History of the Proceedings

A. The Nature of Yale's Present Authority:

Yale's Certificate authorizes it to operate over various regular and irregular routes within New England. If portions of its authority are "tacked",[2] Yale may operate, generally, between all points within the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts. Since, however, Yale can serve only certain points in one state, from a specific point in another state, a part of its operations within its authorized territory must be conducted through so-called "gateway" points. Thus, Yale may serve the entire Commonwealth of Massachusetts but its service to Massachusetts (except as to regular route points) must be conducted via the gateway point of New Haven and when Yale transports a shipment from New London, Connecticut to New Bedford, Massachusetts (both points situated east of New Haven) it must operate to New Haven (approximately 51 miles west of New London) and then proceed to New

[2] The right to "tack" separate portions of operating authority is not only permissive but valuable. This is made evident by the fact that the Commission frequently prohibits tacking by appropriate provisions in the Certificates it issues (cf. *T. T. Brooks Trucking Co. Inc. Conversion Application*, 81 M. C. C. 561, 1959).

Bedford. Consequently, Yale must travel 187 miles, rather than 85 direct miles in order to comply with the gateway condition. Further, Yale can serve irregular route points in Connecticut only through the Port Chester, New York gateway. Hence, a shipment to an irregular route point in Connecticut from any point in Massachusetts or Rhode Island must move through Port Chester, New York.

B. The Application and the Proceedings:

On or about October 12th, 1960, Yale filed an application to modify its Certificate by eliminating the gateway points of New Haven, Connecticut and Port Chester, New York. If the application were granted, Yale would be authorized to serve directly those points it is now obliged to serve in a circuitous and uneconomic manner.

The application was assigned for oral hearing, on January 20, 1961, before Examiner Reece Harrison. Yale introduced extensive evidence in support of its application and although several motor carriers appeared in opposition [3] they adduced no evidence at all as to their operations.[4]

On or about April 18th, 1961, the Examiner filed his Report in which he recommended denial of the application, holding *contrary to all of the evidence of record*, that Yale was not an effective and efficient competitor of the protestant motor carriers and that elimination of the gateway requirement would enable Yale to institute a new service or a service so different from that presently

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[3] Applicant was prepared to consent to an adjournment to accommodate protestants but the Examiner refused to grant an adjournment.

[4] Protestants filed only copies of their Certificates, financial statements and lists of equipment.

provided as to materially improve Yale's competitive position, to the detriment of existing carriers (Appendix C, p. 35).

Following the service of the Examiner's Report and Recommended Order, exceptions were filed by Yale and the protestants replied. On or about July 20, 1961, the Commission, by Division I, entered its order, dated July 12, 1961, which denied the application and adopted the Examiner's Report in its entirety.

Thereafter, Yale appealed to the United States District Court for the Southern District of New York and the decision of the Commission was sustained and the complaint was dismissed. A notice of appeal from the judgment dismissing the complaint was then filed.

The Questions Are Substantial

The issues involved in this case have not been resolved by the Court in previous cases and their character and scope are neither academic nor parochial. (Mr. Justice Douglas, *The Supreme Court and Its Case Load*, 45 Cornell L. Q. 401, 1960). Legal and economic matters of grave importance to the trucking industry and to the shipping industry have been decided by the Commission in a way which discloses an "improvident exercise of its discretion" (*Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 1962). The Court below approved the Commission's Order only because it misconceived the office of judicial review (*Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 1951).

1. The error of the Court below is found in its failure to critically examine the Examiner's report and its refusal to recognize the basis for the Commission's order.

The fact is that the District Court declined to decide the case upon the grounds relied upon by the Commission, namely, the Commission's new construction of Sections 307 and 308, as it affects cases of gateway elimination and alternate routes (Appendix C, p. 34), and justified the egregious departure from all previous standards by holding that this "does not require corrective action by a reviewing court" (Appendix A, p. 17). But this is manifestly incorrect. Yale's application was heard and expressly determined under the *Childress, supra* doctrine, as the Examiner's discussion shows (Appendix C, p. 34). Unfortunately, the Examiner misread *Childress, supra*, to mean that an applicant who proves that safety, economy and efficiency of operations will be promoted by eliminating a restrictive gateway must also prove that these salutary benefits will not create a "new service" (Appendix C, p. 35). This is not the lesson of *Childress*, and presumably, the Court below recognized this but sought to avoid it by resorting to the shibboleth that consistency is the hobgoblin of judicial minds whereas the characteristic sign of expertise is flexibility, freed from arcane notions of *stare decisis*. To be sure, the Commission may abandon prior standards, but it must explain why because its discretion is not unlimited [*Federal Communications Commission* v. *RCA Communications, Inc., supra* (1953)].

In *Burlington Truck Lines, Inc.* v. *United States, supra*, the Court said:

> "And for the Courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp.* v. *Labor Board*

317 U. S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence" (pp. 167, 168).

Assuming, *arguendo*, that the Commission may "legislate" or perpetuate inefficient or wasteful or uneconomic operations, it is clear that it cannot disregard the mandate of the National Transportation Policy and it may not arbitrarily reject the facts of record.

2. The core of the Commission's decision was a finding, without support in the record, that Yale was not an efficient and effective competitor of the protestants and that approval of the application would so materially alter the competitive situation as to create a "new service." Both "findings" (actually conclusions) are erroneous and will be briefly reviewed.

The evidence of record did not show, as the Examiner incorrectly said, that a large number of shipments could not be handled efficiently or competitively by Yale. (Appendix C, p. 34). Indeed this statement does violence to the record: Exhibits 12 through 17 showed that of the shipments which were picked up by Yale during three representative weeks, 80% were delivered on the next business day and, hence, received "overnight delivery service," as that term is understood in the trucking industry (cf. *England Bros. Truck Lines, Inc.* Extension—Alternate Route, 13 Fed. Car. Cas. (CCH) Par. 34528, 1959).

3. The Examiner also incorrectly held that although Yale transported a substantial number of less-than-truckload shipments, the total tonnage was, nevertheless, "relatively light" (Appendix C, p. 34). But an annual projection of the traffic exhibits introduced by Yale dis-

closes that for the year 1960 Yale would have transported approximately 16,592 shipments, consisting of 139,863 pieces of freight weighing 5,783,859 pounds through the New Haven gateway and received a gross revenue of $87,381.02. The Commission also knew that operations between Yale's U. S. 1 regular route points in Connecticut, Rhode Island and Massachusetts (the principal shipping points in these states) were not included in the exhibits, because they were not involved in this proceeding.

It is and was apparent that a tremendous volume of traffic clears the New Haven gateway.[5] Parenthetically, is may be noted that the term "relatively light" implies comparisons. The fact is there was no basis in the record for the Commission to make this quantitative judgment since protestants adduced no evidence at all concerning their operations and there was no evidence of the volume of traffic in the considered territory. For this reason alone the order should have been vacated [*Public Service Commission of Utah, et al.* v. *United States, et al.*, 356 U. S. 421 (1958), reh. den. 357 U. S. 933 (1958)]. To assume that Yale is not an effective competitor in the absence of a scintilla of evidence to the contrary is self-evidently capricious and captious.

4. Since *Childress* was, in fact, the basis of decision, the Court below should not have declined to decide whether the Commission purported to follow its "pat-

[5] The fact that only 1.31% of Yale's tonnage moves through the gateways is irrelevant. To begin with, 1.31% is a percentage of freight handled *throughout the appellant's entire territory* and not wholly within the three-State New England area (where the percentage would obviously be far in excess of 1.31%). Moreover, 1.31% of millions of tons of freight is a substantial amount of freight in tonnage and revenue.

tern" (Appendix A, p. 17). Even if *Childress, supra,* requires a determination as to the existence of "new service" where economy of operations is proved, the evidence in this case overwhelmingly established that a new service would not be created if the application were approved. Yale has been operating in the territory and all of the evidence in this proceeding is consistent with the criteria formulated in *Childress, supra.* For many years, Yale has actively transported substantial amounts of traffic, of all descriptions, through the gateway points, from and to all points it is authorized to serve. Hence, the burden of proving effective *present* competition and substantial economies was met by Yale when it showed the vast number of points served, the large volume of freight handled and the diversity of commodities transported through the Portchester and New Haven gateways (Exhibits 12 through 17). To deny relief here is to subvert the spirit of the Interstate Commerce Act:

> "the Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices (*McLean Trucking Co. v. United States*, 321 U. S. 67, 86, 1944)."

In *Dixie Ohio Express Company Extension of Operations—Bristol* (30 M. C. C. 291, 295, 1941), the Commission said:

> "In our opinion, public convenience and necessity, in a proper case, may be found in operating economies and those things which contribute to expedition, safety, and efficiency in operation, all of which, though they benefit first the carrier, indirectly contribute to public safety and more reli-

able, more expeditious, and cheaper transportation. Given a proper showing of these things, a finding of public convenience and necessity is justified."

Since Yale has been an effective competitor, the application should have been granted upon proof of operating economies. This test was reaffirmed by the Commission in *Cooper's Express, Inc., Extension-Alternate Route* (51 M. C. C. 411, 414-415, 1950) where it was held:

> "In determining these so-called alternate route applications, the essential issue presented is whether applicant is actually engaged in the transportation of traffic, in substantial volume, between the termini of the proposed alternate or direct route and is at present in a position to compete with other carriers for such traffic, or whether the new route will enable applicant either to institute a new service not theretofore conducted, or to institute a service so different from that theretofore provided as materially to alter the competitive situation to the detriment of existing carriers. In the case of the former, we are justified in granting the authority sought solely upon proof that the proposed operation would result in operating economies * * * "

And in *Long Transportation Co.—Extension—Additional Gateway* (76 M. C. C. 615, 618, 1958), it was held that:

> "Use of the proposed route would not enable applicant to compete more effectively than at the present in the considered New Jersey territory or to provide an essentially new or different service, since a saving of 3 hours time in a movement which

requires 2 days would not in the circumstances here presented, amount to a new service."

To be sure, in some proceedings, the Commission has refused to eliminate gateways where substantial mileage savings were involved (*Chicago Express, Inc.—Extension—Tuscola, Ill.*, 79 M. C. C. 384, 1959). But mileage reduction is a vital issue only when it enables a carrier to participate in new freight movements or alters the applicant's competitive position. For example, relief will be denied if mileage reductions enable an applicant to replace second morning service with overnight delivery. The case at bar is distinguishable not only because of the lesser mileage involved (500 in the cited case and a maximum of 250 in the instant case) but because Yale does provide overnight delivery throughout its authorized territory and mileage reductions will in no way enhance its competitive position. [Cf. *Safeway Truck Lines, Inc.*, M. C. C. , No. MC-110193 (Sub. No. 34), decided October 31, 1960; *Ace Lines, Inc. Extension—Elimination of Gateway*, 79 M. C. C. 685 (1959); *The Maryland Transportation Company Extension*—Specified Commodities, 83 M. C. C. 451 (1960); *Powell Brothers Truck Lines, Inc., Extension of Operations—Direct Route*, 33 M. C. C. 93 (1942).]

5. The Commission went *de hors* the record when it arbitrarily found that protestants would be adversely affected if this application were approved. Not a scrap of evidence was introduced on this issue by protestants and the Commission knows that the mere existence of operating authority does not prove actual operations. [*Mushroom—Control—S & M*, 85 M. C. C. 459, 1960; *Short Line—Purchase—New England Transportation Company*, 70 M. C. C. 459, 1957.]

6. The judgment of the Court below should be dismissed because:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice." (Burlington Truck Lines, Inc. v. United States, supra, p. 167.)

Conclusion

It is respectfully submitted that the decision of the District Court is erroneous as a matter of law and should be reversed. At the very least, this case should be remanded to the Commission.

Appellant believes that the questions presented by this appeal are substantial and of importance not only to the public generally, but to the Commission and those who are regulated by, and are subject to, the jurisdiction of that agency.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Yale Transport Corp.

March 15, 1963.

APPENDIX A

Opinion of United States District Court, Southern District of New York

Dimock, D. J.

This is a suit under the provisions of Title 28 U. S. C. §§1336, 1398, 2321-2325, and Title 5, U. S. C. §1009, to set aside an order of the Interstate Commerce Commission, hereinafter Commission, dated July 20, 1961, which denied an application by Yale Transport Corp., hereinafter plaintiff, filed under section 207 of the Interstate Commerce Act, 49 U. S. C. §307, for a certificate of public convenience and necessity as a common carrier.

Under authority granted by the present certificate of public convenience and necessity plaintiff, by a process of "tacking", may operate generally between all points within Connecticut and Massachusets. Because, however, plaintiff can serve only certain portions of one state from a specific point in another state, operations to and from irregular route points within the described territory must be conducted through gateway points. Thus, for example, although plaintiff may serve the entire State of Massachusetts, its service to Massachusetts (except to certain so-called regular route points) must be conducted via the gateway point of New Haven.

The application to the Commission was designed primarily to modify its certificate so as to enable it to eliminate the necessity of operating through these gateway points and thereby avoid circuitous operations.

This application, filed October 12, 1960, resulted in a recommended order of the trial examiner embodying the conclusion that plaintiff had failed to establish that the present and future public convenience and necessity re-

quired the proposed operation. The Commission adopted the examiner's report in its entirety and entered its order on July 20, 1961, denying the application.

Except for the Administrative Procedure Act, the only applicable statute cited to us is section 207 of the Interstate Commerce Act, 49 U. S. C. 307, which reads as follows:

> "(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

There is no controversy over the question whether the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of law and the requirements, rules and regulations of the Commission. The only question of law left under the statute is, therefore, whether the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity.

No direct evidence that the service is or will be required by the present or future public convenience and necessity was introduced. On the contrary, plaintiff contends that the propsed service is so like a service rendered under a present certificate that the fact that the service is required by the present or future public convenience and necessity has already been determined by the issuance of its present certificate. See Judge Chesnut's opinion in Interstate Common Carrier Council v. United States, D. C. D. Md. Civ. Div., 84 F. Supp. 414, 420. The Commission has decided against this contention. In reaching this decision the Commission purported to follow the pattern laid down in Childress-Elimination Sanford Gateway, 61 M. C. C. 421. Plaintiff says that the pattern was not correctly followed.

We need not decide that question. The fact that a new decision of administrative tribunal departs from the rule of an earlier one does not require corrective action by a reviewing court. Georgia Comm. v. United States, 283 U. S. 765; 775; Ace Freight Forwarding Corporation v. United States, D. C. S. D. N. Y., 169 F. Supp. 403, 405. We must decide whether the Commission correctly applied the law, not whether it followed its own precedents.

Plaintiff charges that the decision departed from the Administrative Procedure Act in that the Commission completely disregarded the requirements of section 8(b) of the Administrative Procedure Act, 5 U. S. C. §1007(b), in summarily dismissing exceptions and adopting an ultimate conclusion which was not grounded upon basic findings supported by probative evidence of record.

As we have stated, the ultimate conclusion of the examiner, adopted by the Commission, was, in recognition of the ultimate question of law presented, "that applicant

has failed to establish that the present and future public convenience and necessity require the proposed operation".

This is supported by statistics summarized in the decision which detail the characteristics of the circuitous service now rendered through the gateways and the characteristics of the proposed direct service. This summary had a logical bearing on the subsidiary, though fundamental, question whether the proposed service was so close to the old service that the original determination of public convenience and necessity would cover both. On it was based the finding that the proposed service was so different from the old as to constitute a new service and consequently one as to which there had been no determination of public convenience and necessity. Even were we to disagree with this conclusion, to say that it was not grounded upon basic findings supported by probative evidence of record would be to use empty words.

Judgment for defendant.

Dated: November 19, 1962

E. J. DIMOCK
United States District Judge

I concur.

THURGOOD MARSHALL
United States Circuit Judge

THOMAS F. CROAKE
United States District Judge

APPENDIX B

Service Date
July 20, 1961

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 12th day of July, A. D. 1961.

No. MC-17778 (Sub-No. 32)

YALE TRANSPORT CORP. ELIMINATION OF GATEWAYS
New York, N. Y.

Upon consideration of the application and the record in the above-entitled proceeding, including the report and recommended order of the examiner, the exceptions thereto filed by applicant and the replies to the exceptions filed jointly by St. Johnsbury Trucking Co., Inc., W. T. Byrns Motor Express, Inc., The Adley Express Company, Boston & Taunton Transportation Company, Old Colony Transportation Co., Inc., Cargo-Imperial Freight Lines, Inc., and Rapid Transit Co., Inc., and jointly by Alvin R. Holmes, Gay's Express, Inc., Newburgh Transfer, Inc., Marcell's Motor Express, Inc., and H. P. Welch Co., and

IT APPEARING, That the exceptions and replies raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report by Division 1 discussing the evidence in the light of such pleadings;

Wherefore, and good cause appearing therefor:

We find, That the exceptions filed herein are without merit; and that the statement of facts, the conclusions and the findings of the examiner, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, Therefore, that the said application for a certificate of public convenience and necessity be, and it is hereby, denied.

By the Commission, division 1.

Harold D. McCoy,
Secretary.

(seal)

APPENDIX C

REPORT AND ORDER RECOMMENDED BY REECE HARRISON, HEARING EXAMINER

No. MC-17778 (Sub-No. 32)

YALE TRANSPORT CORP. ELIMINATION OF GATEWAYS

Decided .....

Public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle of general commodities, with certain exceptions, between the points described by the elimination of certain gateways. Application denied.

Herbert Burstein, Arthur Liberstein and *Samuel B. Zinder* for applicant.

Andre J. Barbeau, Kenneth B. Williams, Francis P. Barrett, Leonard A. Jaskiewicz and *Paul J. Keeler* for protestants and interveners.

By application filed October 12, 1960, as amended, Yale Transport Corp., of New York, N. Y., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, (1) of general commodities, except those of unusual value, and except Classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, (a) between Washington, D. C., Baltimore, Md., Philadelphia, and Marcus Hook, Pa., and Trenton, N. J., on the one hand, and, on the other, points in Hudson, Essex, Union, Morris, Middlesex, Passaic and Bergen Counties, N. J.,

(b) between New York, N. Y., New Rochelle, N. Y., and points in Westchester County, N. Y., within 15 miles of New Rochelle, on the one hand, and, on the other, points in Massachusetts and Connecticut, except that no traffic shall originate at points in Connecticut east of U. S. Highway 5, (c) between points in Massachusetts and Connecticut, except that no traffic shall originate at points in Connecticut east of U. S. Highway 5, (d) between Providence, R. I., on the one hand, and, on the other, points in Massachusetts and Connecticut, except that no traffic shall originate at points in Connecticut east of U. S. Highway 5, over irregular routes, (e) between Concord, N. H., and Boston, Mass., over regular routes, serving all intermediate and off-route points in Massachusetts within the area bounded by a line beginning at a point on the Atlantic Ocean and extending in a westerly direction through Saugus to Melrose, Mass., thence in a southwesterly direction to Waltham, Mass., thence in a southeasterly direction to Newton, Mass., thence in a southerly direction to Dedham, Mass., thence in a northeasterly direction through Milton to Neponset, Mass., and thence along the Atlantic Ocean to point of beginning and (2) general commodities, except used household goods, and except Classes A and B explosives, commodities requiring dump truck service, commodities in bulk and those requiring special equipment between Amsterdam, Hudson, Albany, Schenectady, Cohoes, Troy, Johnstown, Gloversville, Voorheesville, Middleville, Colonie, Menands and Saratoga Springs, N. Y., on the one hand, and, on the other points in Massachusetts and Connecticut, except that no traffic shall originate at points in Connecticut east of U. S. Highway 5, over irregular routes.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held January 20, 1961 at New

York, N. Y. J. E. Faltin Motor Transportation, Inc., Alvin R. Holmes Transportation Service and/or Jones Express, Newburg Transfer, Inc., Gay's Express, Inc., Taylor's Express Co., Marcell Motor Express, Inc., Adley Express Company, Boston Taunton Transportation Company, Henry Jenkins Transportation Co., Inc., Old Colony Transportation Company, Inc., Cargo-Imperial Freight Lines, Inc., Rapid Transit Company, Inc., St. Johnsbury Trucking Co., Inc., and W. T. Byrns Motor Express Co., Inc., oppose the application. P. B. Mutrie Motor Transportation, Inc., Leaman Transportation Company, Inc., Leaman Transportation Corporation, Chemical Tank Lines, Inc., and T. I. McCormack Trucking Co., Inc., appeared in opposition but withdrew from the proceeding when the application was amended.

Applicant holds authority to operate as a common carrier of the commodities described and in the manner described in the appendix and other authority not pertinent to this proceeding. The purpose of the instant application is to eliminate the gateways of Secaucus, N. J., New Haven, Conn., and New Rochelle, N. Y., and the gateway territory of points in Westchester County, N. Y., within 15 miles of New Rochelle and Port Chester, N. Y., in this area, is the actual gateway. Applicant maintains terminals at Hartford, New York City, North Bergen, Philadelphia, Baltimore, New Haven, Worcester, Providence, Boston, Albany and Nashua, N. H. It operates 295 tractors, 540 trailers and 180 straight trucks. A balance sheet statement as of December 31, 1959, shows current assets of $3,430,486.40 and current liabilities $2,293,525.13. Net income, after taxes, for 9 months ended September 30, 1960 was $239,112. Applicant is able to conduct the proposed operation.

Two company witnesses presented evidence pertaining to the issues involved; one described the proposed operations and the other explained the cost study relative to the handling of less-than-truckload shipments through the several gateways previously mentioned. In some instances tacking takes place between points on regular and those on irregular routes. Several examples of the mileage that would be saved are shown below, if the authority sought is granted. The direct and gateway mileage was taken from an exhibit in evidence.[1]

			Direct	*New Haven*	*Circuity*	*Percent*
Taunton, Mass.	to	Hartford, Conn.	89	157	68	43
New Britain, Ct.	"	Wakefield, Mass	101	185	84	43
Haverhill, Mass.	"	Norwalk, Ct.	208	208	0	0
Manchester, N. H.	"	Brockton, Mass.	78	310	232	74
				Port Chester		
Winsted, Ct.	"	Bristol, R. I.	120	256	136	53
Clinton, Mass.	"	Milford, Ct.	117	215	98	45
Fall River, Mass.	"	Torrington, Ct.	115	272	157	57
Boston, Mass.	"	Bethel, Ct.	156	249	93	37
				N. Bergen		
E. Hartford, Ct.	"	Amsterdam, N. Y.	137	307	170	55
Troy, N. Y.	"	Wallingford, Ct.	131	254	123	48
Boston, Mass.	"	Schenectady, N. Y.	189	392	203	51
				Secaucus		
Dayton, N. J.	"	Philadelphia, Pa.	50	131	81	61
Boonton, N. J.	"	Baltimore, Md.	184	202	18	8
Plainfield, N. J.	"	Philadelphia, Pa.	67	111	144	129

[1] The parties agreed that reference may be made to the Rand McNally Mileage Guide for determination of distances.

The mileage figures above are fairly representative of those involved in the abstracts, covering a wide variety of commodities supported by delivery receipts of more than 1,100 shipments that moved through the New Haven gateway for a three week period, August 1 through August 5, September 12 through September 16 and October 31 through November 4, 1960; more than 900 shipments through the Port Chester gateway; and more than 600 shipments through the North Bergen gateway during the same three-week period. There were over 100 shipments that moved through the Secaucus gateway during the period August 1 through November 4, 1960. Shipments listed on the abstracts represent approximately 80 percent of the total number of shipments that moved during the periods specified and less than 5 percent involved a two line-haul.

Detailed cost figures were submitted as an exhibit to show the handling of the freight in excess of the normal handling that would occur in pickup and delivery and the line-haul cost over and above what would accrue on the most direct route that could be traveled if the gateways were eliminated. In some instances the handling costs were twice the normal cost because the shipments were handled at two gateways to arrive at destination. The study was made on a two week period and then multiplied by six and one-half to arrive at a quarterly cost. The total quarterly cost of handling the traffic in question through the gateways was $15,095 more than would have accrued under the proposed operation.

Two skipper witnesses appeared in support of the application, not to show public convenience and necessity, but to express their opinions as to the efficiency of the proposed operation. Polaroid Corporation, ships cameras and photographic supplies, from Cambridge, Need-

ham Heights and Waltham, Mass., to numerous points including points in Connecticut, New York and Massachusetts. This merchandise is expensive and any reduction in handling will likewise reduce the chance for theft and it will afford a faster service to customers, most of which carry a small inventory. The commodities are seasonal to some extent. Applicant's service has been utilized from origins mentioned above to points in Connecticut during peak seasons with no criticism of the service. Shipper also uses other carriers to Albany and if this application is granted no traffic would be diverted from existing carriers.

John Irving Stores, Corp., of Boston, ships shoes to numerous points in Connecticut by applicant which provides overnight delivery in most instances. This is style merchandise, expeditious handling is essential, customers carry small inventories and they prefer forenoon delivery. Due to limited loading space at the warehouse, an attempt is made to select carriers that are authorized to serve large areas. It also receives shipments from a manufacturer of shoes at Gloversville. Pilferage is rather high, therefore, single line service would reduce the possibility of theft. Granting of the authority sought would speed up delivery over the present service where circuitous routes are involved by reason of having to operate through gateways, and shipper would not divert any traffic from other carriers.

Protestants' Evidence

Alvin R. Holmes, doing business as, Holmes Transportation Service is authorized to transport general commodities, with exceptions, between points in Massachusetts, Rhode Island, Connecticut, New Hampshire now served by applicant and points in New York and New

Jersey within 20 miles of New York City, over irregular routes. It maintains terminals at Worcester; Fitchburg, Springfield, Boston, Manchester, Pawtucket, Newington, Bridgeport and Secaucus, and operates 65 tractors, 144 trailers and 68 straight trucks.

Gay's Express, Inc., holds authority to operate as a common carrier of general commodities, between points in four counties in New York, including Albany and Hartford, and numerous points in Massachusetts, Manchester and Concord, N. H., over irregular routes. It has terminals at Bellows Falls, Vt., and four points in Massachusetts, Newington, Conn., and Manchester and operates 52 tractors, 128 trailers and 16 straight trucks.

Newburg Transfer, Inc., is a common carrier of general commodities, with certain exceptions, between points in the Albany area on the one hand, and, on the other, New York City, and Philadelphia, serving most of the points served by applicant and by interchange with Holmes Transportation Service can serve points in New England, over irregular routes.

H. P. Welch Co., operates as a common carrier of general commodities, with certain exceptions, serving all points in New Hampshire served by applicant and between points in Connecticut on the one hand, and on the other, specified points in Massachusetts, Rhode Island, New Jersey, and Pennsylvania, over irregular routes. It maintains terminals at Springfield, Manchester, Keene, Claremont, Ruthland, Burlington, Barre and Jersey City, and operates 58 tractors and 187 trailers.

Marcell's Motor Express, Inc., holds authority to operate as a common carrier of general commodities, with exceptions, over irregular routes, (a) between points in specified counties in Vermont on the one hand, and on

the other, points in Massachusetts and Connecticut, and those in New York and New Jersey within 50 miles of the Vermont-New York, Massachusetts-New York and the Connecticut-New York State lines, except those on Long Island not within greater New York City and (b) between Brattlesboro, Vt., on the one hand, and, on the other, New Hampshire and Vermont within 50 miles of Brattleboro, over irregular routes. Protestant operates 54 tractors, 90 trailers and 42 straight trucks. It has terminals at Albany, Barre, Burlington, Ruthland and Swanton, Vt., Brooklyn, N. Y. and Boston.

Taylor's Express Co., holds a certificate authorizing the transportation of general commodities, with exceptions, over regular routes, (a) between Haverhill, Mass., and other specified points in Massachusetts, and (b) over irregular routes, between Haverhill and Merrimac, Mass., on the one hand, and, on the other, points in a described area in New Hampshire.

J. E. Faltin Motor Transportation, Inc., holds authority to operate as a common carrier by motor vehicle of general commodities, with exceptions, over irregular routes, (a) between Manchester and points within 20 miles thereof on the one hand, and, on the other, points in New York, N. Y., commercial zone, Newark, N. J., Providence and points within 10 miles thereof, Springfield, Worcester and points in Massachusetts within 15 miles of each, (b) between New York, N. Y., on the one hand, and, on the other points in New Jersey within 30 miles of Columbus Circle, New York, N. Y., and (c) between Pittsfield, N. H., on the one hand, and, on the other, points in Connecticut, Massachusetts, and Rhode Island, and other authority not here pertinent. Among others it has terminals at Manchester, Boston, New York City, and Jersey City, and operates 106 tractors, 163 trailers, and 44 straight trucks.

St. Johnsbury Trucking Co., Inc., is authorized to transport general commodities over regular routes, (a) between Boston and Bangor, Maine, serving all intermediate points, (b) between Portsmouth and North Conway, N. H., serving all intermediate points, (c) between Boston and New York City, serving all intermediate points in Massachusetts and New York City, the off-route points of Shrewsbury, Cherry Valley and Milbury, Mass., those within 15 miles of the City Hall, Boston and those within 20 miles of City Hall, New York City, except Carteret, Perth Amboy, New Brunswick, East Rutherford, Haledon, Harrison, Irvington, Linden, and Rahway, N. J., and those in New York, N. Y., commercial zone without restriction, serving the off-route points of Carteret, Perth Amboy, New Brunswick, East Rutherford, Haledon, Harrison, Irvington, Linden, and Rahway, and those in the New York, N. Y., commercial zone, restricted to traffic moving to or from points north and east of New York City, and serving the intermediate points of Hartford and East Hartford, Conn., points on U. S. Highway 5 north of East Hartford, which are in Connecticut, Providence and points on authorized routes within 10 miles of Providence and the off-route point of Howard, R. I., and (d) between Manchester and Keene, serving no intermediate points.

The McFarland Transportation Company holds authority to transport general commodities, over irregular routes, (a) between points on U. S. Highway 1 between New Haven and Greenwich, Conn., both inclusive, on the one hand, and, on the other, New York City and points in New York and New Jersey within 10 miles of New York City, (b) between New Haven on the one hand, and, on the other 17 specified points in Massachusetts, 7 points in New Jersey, Woonsocket and Providence and Hamden and West Haven, Conn., and (c) from New Haven to

Providence and Apponaug, R. I., (d) over regular routes, between New Haven and Springfield, serving all intermediate points, (e) between New Haven and Norwich, Conn., serving the intermediate and off-route points of Old Lyme, Niantic, Waterford, New London, Guilford, Clinton, Madison, Westbrook, Baybrook, Montville, Taftville, and Groton, Conn., (f) between Westfield and Northampton, Mass., serving all intermediate points, and the off-route points of Easthampton and South Hadley Falls, Mass. Bay State is authorized to transport general commodities over regular routes, (a) between Sturbridge, Mass., and New Haven, serving the off-route points of Danieldon, Rockville, Burnside, Williamantic, Unionville, Manchester, and New Britain, Conn., (b) between Boston and Providence, serving the off-route points of Statesville, Greystone and Pascoag, R. I., and Blackstone, Mass., serving all intermediate points on two described routes between Boston and Providence.

W. T. Byrns Motor Express, Inc., holds a certificate authorizing the transportation of general commodities, with certain exceptions, over irregular routes, between Amsterdam, Broadilbin, Canajoharie, Gloversville, Johnstown, Dodgeville, Middleville, Mohawk, Newport, Northville, Fonda, Fort Plain, Frankfort, Fultonville, Cohoes, Schenectady, Kerkimer, Ilion, Little Falls, Mayfield and St. Johnsville, N. Y., and points in New York within 15 miles of the above-specified points, on the one hand, and, on the other Springfield, Ludlow, Worcester and Boston and points within 10 miles of Boston. It operates 69 tractors, 101 trailers and 14 straight trucks.

Fred S. George & Son, Inc., is authorized to operate as a common carrier to transport, over irregular routes, paper from Mechanicsville, N. Y., through Albany and Pittsfield to Boston, (2) over irregular routes, of paper,

paper products, paperboard and boxboard, from Albany, Rensselaer, Saratoga and Washington Counties, N. Y., to points in Massachusetts, Rhode Island, Connecticut, New York and those in New Jersey on and north of New Jersey Highway 33, and (3) equipment, materials, and supplies used in the manufacture of the commodities described in (2) above, from points in the described destination States in (2) above to points in the counties mentioned in (2) above.

The Adley Express Company holds authority to transport general commodities, with exceptions, over regular routes, (a) between Boston and Philadelphia; New York City and Patterson and Newark; from and to specified points in Massachusetts; serving all intermediate points on the above routes, and the off-route points of West Conshohocton and Pottstown, Pa., Purchase, Valhalla, West Haverstraw, Thiells, Congers, Sprakhill, Scarsdale, Tuckahoe, Brewster, Carmel, Jefferson Valley, and Scrub Oak, N. Y., points in Massachusetts, Rhode Island, and Connecticut, those in Bergen, Hudson, Passaic, Essex, Union, Somerset, Morris, Middlesex, Mercer, Monmouth, Burlington and Camden Counties, N. J., those in Pennsylvania; between Winsted, Conn., and Troy, N. Y., serving the intermediate and off-route points of Albany and Merrands, N. Y., and Pittsfield, Lee and Housatonic, Mass.; and (b) over irregular routes from points in that part of Connecticut on and west of U. S. Highway 5 and alternate U. S. Highway 5 to Albany.

Boston and Taunton Transportation Company, is authorized to transport general commodities, with exceptions, over irregular routes, between points in Rhode Island and that part of Massachusetts on and east of a line beginning at the Connecticut-Massachusetts State line and extending along Massachusetts Highway 110 to Law-

rence, and thence along Massachusetts Highway 28 to the Massachusetts-New Hampshire State line. It operates 37 tractors, 61 trailers and 13 straight trucks.

Old Colony Transportation Co., Inc., holds authority to transport general commodities over regular routes, between Boston and Providence; New Bedford and Providence; Albany and Boston; Albany and Gloversville; Waterford and Newburg, N. Y.; and between Schenectady and Newburg. Protestant maintains terminals at Boston, Springfield, Pittsfield, Albany and Poughkeepsie, N. Y., and operates 60 tractors, 9 trailers and 29 straight trucks.

Cargo-Imperial Freight Lines, Inc., a common carrier authorized to transport general commodities, with exceptions, over regular routes, (a) between Buffalo, N. Y., and Boston serving the intermediate points of Rochester, Syracuse, Utica and Albany, all intermediate points east of Albany on described routes, the off-route points within 25 miles of Boston, points in New York and Massachusetts within 25 miles of Albany, and those in Connecticut and Massachusetts within 25 miles of Springfield, and (b) between Albany and points in New York and Massachusetts within 25 miles of Albany, on the one hand, and, on the other, points in Massachusetts and points in described areas in Connecticut and Rhode Island.

Rapid Transit Co., Inc., holds a certificate authorizing the transportation of general commodities, with certain exceptions, between New London, Conn., and Worcester; between Central Village, Conn., and East Walpole, Mass., serving the intermediate and off-route points of Oneco, Conn., River Point, Quidnick, West Warwick, Artic, Phenix, Fiskeville, Hope, Crompton, Oakland Beach, Warwick, Pontiac, Phillipsdale, Granston and Thornton, R. I., Dodgeville, Attleboro, Norton, Mansfield, Franklin, City

Mills and Millis, Mass.; between Danielson, Conn., and New Bedford, serving specified intermediate and off-route points in Connecticut and Massachusetts; between Worcester and Providence, serving all intermediate points and specified off-route points in Rhode Island; between Boston and Middletown, Conn., serving all intermediate points and designated off-route points in Connecticut and Rhode Island; between Boston and Meridan, Conn., serving all intermediate points, and between Boston and Hartford serving all intermediate points, and over irregular routes between points on Routes 1 to 6 inclusive on the one hand, and, on the other, Williamantic, Conn., Bradford, Hope Valley, Wakefield and LaFayette, R. I., North Adams, Lawrence, and Lowell, Mass., Philadelphia and points in Massachusetts within 15 miles of State House, Boston. Each protestant holds authority in addition to that described above but it is not pertinent to this proceeding.

Briefs were filed on time by applicant and Alvin B. Holmes, et al and they were very helpful in the preparation of this report. Brief filed by St. Johnsbury Trucking Company, Inc., et al was received after the brief date.

Discussion and Conclusion

The elimination of gateways may be accomplished in one or two ways: (a) by showing that for reasons of safety, economy, or improved efficiency of authorized operations, an application should be granted, or (b) by showing that an actual need exists or will exist for the proposed service which either cannot or will not be met as well by the existing carriers.

In meeting the requirements set out in (a) above, applicant must show that it is presently actively transporting a substantial volume of traffic from and to the points

by operating in good faith through its gateway, and in so doing, is effectively competing with existing carriers, and that elimination of the gateway requirements would not enable applicant to institute a new service or a service so different from that presently provided as to improve materially applicant's competitive position to the detriment of existing carriers. *Childress—Elimination Sanford Gateway,* 61 M. C. C. 421. To authorize applicant to conduct the proposed operations which it cannot now perform efficiently and effectively in competition with existing carriers, without any showing of need therefor, would be directly contrary to the mandate of the Interstate Commerce Act. Although applicant contends that it is presently an effective competitor, demonstrates by its own evidence the larger number of shipments which it cannot handle efficiently or competitively, that it is not effectively competing for this traffic. While it may be that applicant is handling a large volume of shipments and is an effective competitor between certain points where gateway circuity is not involved, the evidence clearly shows that observance of the present gateway impedes substantially its ability to render effectively competitive service to and from many points in the considered areas.

It is true that during the period covered by the abstracts of shipments in evidence that applicant was transporting a substantial number of less-than-truckload shipment, nevertheless the total tonnage is relatively light. In the Childress case it was recognized that a mileage savings of 23 to 29 percent would alter the competitive situation in instances where the one-way movement is 300 miles or more. As shown in the 14 examples in the tabulation above, there were only three shipments that moved over 300 miles and the percentage of circuity is greater in each instance than was involved in the Childress case.

Elimination of the gateways in question would enable applicant to decrease its operating time between most of the points under consideration to such an extent that it would no longer correspond to the operation presently conducted by applicant, thereby increasing its competitive situation to the detriment of existing carriers whose service has not been shown inadequate in any respect. The examiner concludes that the proposed service would be tantamount to a new service, and since no need has been shown for any new service, the application should be denied.

The examiner finds that applicant has failed to establish that the present and future public convenience and necessity require the proposed operation; and that the application should, therefore, be denied.

It is recommended that the appended order be entered.

By Reece Harrison, Hearing Examiner.

(Signature) REECE HARRISON

APPENDIX

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC-17778

YALE TRANSPORT CORP., NEW YORK

REGULAR ROUTES:

General commodities, except used household goods, and except Class A and B explosives, and commodities requiring dump truck service,

Between New York, N. Y., and Amsterdam, N. Y., serving the intermediate points of Yonkers, Pough-

keepsie, Newburg, Hudson, Albany, and Schenectady, N. Y., and the off-route points of Cohoes, Troy, Johnstown, Gloversville, Voorheesville, Middleville, Colonie, Menands, Saratoga Springs, Tuckahoe, and White Plains, N. Y. and Pittsfield, Mass.

From New York over U. S. Highway 9 to Albany, N. Y. (also from New York across the Hudson River to junction U. S. Highway 9W, thence over U. S. Highway 9W to Albany), thence over New York Highway 5 to Amsterdam, and return over the same route.

Between New York, N. Y., and Boston, Mass., serving the intermediate points of Bridgeport, New Haven, New London and Hartford, Conn., Springfield, and Brookline, Mass., and Providence, R. I., and those between Bridgeport and New York, and the off-route points of Waterbury and New Britain, Conn., Mount Vernon and Westchester, N. Y., and Roxbury, Mass.:

From New York over U. S. Highway 1 to New Haven, Conn., thence over U. S. Highway 5 to Springfield, Mass., and thence over U. S. Highway 20 to Boston, and return over the same route.

From New York over U. S. Highway 1 via Westerly and Providence, R. I., to Boston (also from Westerly over Rhode Island Highway 3 to Providence, R. I., and thence over U. S. Highway 1 to Boston); and return over the same route.

Between New York, N. Y., and Washington, D. C., serving the intermediate points of Jersey City, Newark, and Trenton, N. J., Philadelphia, and Marcus Hook, Pa., and Baltimore, Md., and the off-

route points of Hoboken, New Brunswick, Hillside, Elizabeth Port, Elizabeth, Edgewater, Bayonne, Bayway, Perth Amboy, Patterson, Kearney, Passaic, Bergenfield, Bloomfield, and Silver Lake, N. J.:

From New York over U. S. Highway 1 to Philadelphia, Pa., thence over U. S. Highway 13 to junction U. S. Highway 40, thence over U. S. Highway 40 to Baltimore, Md., (also from Philadelphia over U. S. Highway 1 to Baltimore), and thence over U. S. Highway 1 to Washington, and return over the same route.

From New York over U. S. Highway 1 to junction U. S. Highway 130, thence over U. S. Highway 130 to Pennsville, N. J., thence over U. S. Highway 40 to Baltimore, Md., and thence over U. S. Highway 1 to Washington, and return over the same route.

Between junction U. S. Highway 1 and New Jersey Highway 3 and Secaucus, N. J., serving no intermediate points and with no service at junction U. S. Highway 1 and New Jersey Highway 3:

From Junction U. S. Highway 1 and New Jersey Highway 3, over New Jersey Highway 3 to Secaucus, and return over the same route.

Between New York, N. Y., and Walton, N. Y., serving no intermediate points:

From New York across the Hudson River to Jersey City, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Deposit,

N. Y., and thence over New York Highway 10 to Walton, and return over the same route.

Also return from Walton over New York Highway 10 to Delhi, N. Y., thence over New York Highway 28 to Kingston, N. Y., thence over U. S. Highway 9W to junction U. S. Highway 9, and thence over U. S. Highway 9 to New York.

REGULAR ROUTES:

General commodities, except those of unusual value and except Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between New Haven, Conn., and New Britain, and Bridgeport, Conn., serving no intermediate points:

From New New Haven over U. S. Highway 5 to junction Alternate U. S. Highway 5 thence over Alternate U. S. Highway 5 to Berlin, Conn., thence over Connecticut Highway 72 to junction Connecticut Highway 175, and thence over Connecticut Highway 175 to New Britain, and return over the same route. From New Haven over U. S. Highway 1 to Bridgeport, and return over the same route.

Between New York, N. Y., and Danbury, Conn., serving all intermediate points:

From New York over U. S. Highway 1 to junction U. S. Highway 7, thence over U. S. Highway 7 to Danbury, and return over the same route.

IRREGULAR ROUTES:

General commodities, except used household goods, and except Class A and B explosives, and commodities requiring dump truck service,

Between New York, N. Y., on the one hand, and, on the other, points in Nassau County, Long Island, N. Y.

General commodities, except those of unusual value, and except Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment,

Between New Haven, Conn., on the one hand, and, on the other, points in Massachusetts.

Between New York, N. Y., on the one hand, and, on the other, points in Hudson, Essex, Union, Morris, Middlesex, Passaic, and Bergen Counties, N. J.

Between Secaucus, N. J., on the one hand, and, on the other, points in Hudson, Essex, Union, Middlesex, Passaic, and Bergen Counties, N. J.

From New York and New Rochelle, N. Y., and points in Westchester County, N. Y., within 15 miles of New Rochelle, to points in Connecticut, with no transportation for compensation on return except as otherwise authorized.

From points in Connecticut on and west of U. S. Highway 5 to New York, N. Y., and New Rochelle and points in Westchester County, within 15 miles of New Rochelle, with no transportation for compensation on return except as otherwise authorized.

REGULAR ROUTES:

General commodities, except those of unusual value, and dangerous explosives, livestock, commodities in bulk, commodities requiring special equipment and those injurious or contaminating to other lading.

Between Concord, N. H., and Boston, Mass., as follows:

From Concord, N. H., over U. S. 3 to Boston:

From Concord, N. H. over U. S. 3 to Manchester, N. H. thence N. H. 28 to New Hampshire-Mass. State Line, thence Mass. 28, to Boston over either of these routes to Concord.

Service is authorized to and from all intermediate points, and off-route points: Points and places within the territory bounded by a line beginning at a point on the Atlantic Ocean Shore Line and extending in a westerly direction through Saugus, to Melrose, Mass., thence in a south-westerly direction to Waltham, Mass., thence in a southeasterly direction to Newton, Mass., thence in a southerly direction to Dedham, Mass., thence in a northeasterly direction through Milton, Mass., to. Neponset, Mass., and thence along the Atlantic Ocean Shore to point of beginning.

ORDER

Recommended by Reece Harrison,
Hearing Examiner

(Signature) REECE HARRISON

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A. D. 1961.

No. MC-17778 (Sub-No. 32)

YALE TRANSPORT CORP.—ELIMINATION OF GATEWAYS

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

IT IS ORDERED, That said application be, and it is hereby denied.

AND IT IS FURTHER ORDERED, That this order shall be effective on

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

INTERSTATE COMMERCE ACT

Section 207 (49 U. S. C. 307):

"(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

ADMINISTRATIVE PROCEDURE ACT

Section 8(b) (5 U. S. C. Section 1007):

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions.

The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief or denial thereof."

Section 10 (5 U. S. C. Section 1009):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations or short of statutory right (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken by the rule of prejudicial error."

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No. 936

In the Supreme Court of the United States

OCTOBER TERM, 1962

YALE TRANSPORT CORP., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
ROBERT B. HUMMEL,
PATRICK M. RYAN,
Attorneys,
Department of Justice,
Washington 25, D.C.

ROBERT W. GINNANE,
General Counsel,
JAMES Y. PIPER,
FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court, which sustained an order of the Interstate Commerce Commission denying appellant's application for a certificate of public convenience and necessity as a common carrier by motor vehicle.

Appellant, a certificated motor carrier, is successor in interest to B. & E. Transportation Company, Inc.,

a "grandfather" applicant authorized, insofar as is pertinent, to operate over two regular, designated routes between New York and Boston, serving among other intermediate points New Haven and Hartford, Connecticut, and Providence, Rhode Island. *B. & E. Transp. Co., Inc., Common Carrier Application,* 12 M.C.C. 531, 540 (1939). By subsequent purchase, the carrier acquired the right to conduct operations, over irregular routes, between New Haven, on the one hand, and points in Massachusetts, on the other. *B. & E. Transportation Co., Inc.—Purchase—New Haven Trucking Company, Inc.,* Docket No. MC–F–1039 (unreported 1940). Another purchase several years later gave the carrier the authority to operate, over irregular routes, from New York, New Rochelle, and points in Westchester County, New York, within 15 miles of New Rochelle to points in Connecticut, and from points in Connecticut on and west of U.S. Highway 5 to New York, New Rochelle, and points in Westchester County within 15 miles of New Rochelle. *Isidor Eisen—Control; B. & E. Transportation Co., Inc.—Purchase—Werden Barringham,* Docket No. MC–F–3866 (unreported 1948).

By joinder or tacking of these operating authorities at points that are common to them (*i.e.,* are gateways), the appellant may handle a shipment from a point authorized to be served by one grant to a point authorized to be served by another. However, as the Commission noted in approving the Barringham purchase, "In conducting operations under the unified regular- and irregular-route rights, vendee will be required to move shipments through points common to

both operating rights as gateways, and to preserve the distinction between regular and irregular route operating rights." For example, the appellant is authorized to handle freight from Taunton, Massachusetts, to Hartford, Connecticut, but only by operating via the gateway point for the two authorities, New Haven. Similarly, the appellant is authorized to transport shipments from Winsted, Connecticut, to Providence, but, again, only by operating via the gateway points for the two authorities, New York, Rochelle, and points in Westchester County within 15 miles of New Rochelle.

On October 12, 1960, appellant applied for a certificate which, among other things, would have authorized operations directly to and from the points in the irregular-route areas, without observance of the gateway points of New Haven, New York, New Rochelle, and points in Westchester County within 15 miles of New Rochelle (J.S. 6, 21, 23). The appellant offered no evidence of a need for a new transportation service (J.S. 17, 25). Rather, appellant rested its case upon a purported showing that it already was an effective competitor, transporting a substantial volume of freight between the involved points, and that the certificate should be granted as a means of achieving efficiencies and economies in the performance of a transportation service already being rendered (J.S. 17, 24–25). The examiner recommended that appellant's application be denied (J.S. 35):

> Elimination of the gateways in question would enable applicant to decrease its operating time

> between most of the points under consideration to such an extent that it would no longer correspond to the operation presently conducted by applicant, thereby increasing its competitive situation to the detriment of existing carriers whose service has not been shown inadequate in any respect. The examiner concludes that the proposed service would be tantamount to a new service, and since no need has been shown for any new service, the application should be denied.

The Commission found the appellant's exceptions unmeritorous and adopted in its entirety the report and recommended order of the examiner (J.S. 20). The three-judge district court unanimously affirmed the Commission's order on the ground that it was supported by adequate findings and evidence (J.S. 18).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The determination of whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535–536; *United States* v. *Detroit Navigation Co.,* 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Since, as the district court found, the Commission's conclusion was based upon adequate findings supported by probative evidence, there appears to be no occasion for plenary consideration of the case by this Court.

1. Appellate claims, as grounds for review (J.S. 7–8), that the hearing examiner "misread" and misapplied the Commission's decision in *Childress—Elimination of Sanford Gateway,* 61 M.C.C. 421 (1952), and that "[t]he error of the Court below" was its failure to review this "egregious departure from all previous standards." However, the examiner did not fail to follow the *Childress* or any other previous Commission decisions.

Appellant argues (J.S. 4–5, 8) that under *Childress* the Commission must grant an application for elimination of gateways solely upon proof of operating economies, without considering whether the elimination of the gateways would result in the creation of a new service. In *Childress,* the Commission did hold that the granting of an application to eliminate a gateway would be "justified solely upon proof that the proposed operation would result in operating economies" provided the applicant was already "transporting a substantial volume of traffic * * * through the gateway" point so as to "effectively and efficiently competing with the existing carriers." 61 M.C.C. at 428. The Commission, however, went on to say that, where "elimination of the gateway requirement would enable applicant to institute a new service," "it is incumbent upon [the] applicant to prove public convenience and necessity the same as in any other application for new authority." *Ibid.* Similarly, in *Interstate Common Carrier Council* v. *United States,* 84 F. Supp. 414, 420–421 (D. Md.), affirmed *per curiam,* 338 U.S. 843, the district court held that "the Commission has full authority to grant

an alternate route upon a showing merely of economies in operation" without requiring proof as to public convenience and necessity "where the alternative route granted is a truly alternate route and not a new service," but "such evidence [economies in operation] alone is insufficient for an order granting a newly authorized route." See also *Herrin Transp. Co.* v. *United States*, 15 Fed. Carr. Cas. 81,464 (S.D. Tex.) (1962); *Michigan Motor Freight Lines* v. *United States*, 113 F. Supp. 812 (E.D. Mich.); *Clarke* v. *United States*, 101 F. Supp. 587 (D. D.C.).[1]

This view of the Commission and the courts is squarely based on the Interstate Commerce Act itself. Section 207 of the Act (49 U.S.C. 307) provides that the Commission may grant an application for a motor-carrier certificate only if the service is "required by the present or future public convenience and necessity." In situations where no new service is sought, it is consistent with the Act to allow the elimination of gateways upon proof of operating economies. But, where the elimination of gateways results in new service, there is no reason why the ordinary requirements of the Act—that the applicant show that the new service will serve the public convenience and necessity in all respects—should not apply. Thus, it is plain that

[1] Contrary to appellant's contention (J.S. 3), there is no conflict between the decision below and the *Interstate Common Carrier Council*, *Michigan Motor Freight*, and *Clarke* cases. These three cases all recognize, as did the court below, that an application for an amended certificate cannot be granted solely on proof of operating economies, if the proposed service is so different from the old as to constitute a new service. For these reasons they refused to allow amendment of the certificate.

proof of operating economies is not sufficient to justify a certificate of public convenience and necessity if the applicant is seeking to provide a new service.

The examiner, and the Commission in adopting his report, explicitly applied the standards laid down in *Childress* (J.S. 33–34). They found that appellant was "not effectively competing for this traffic" (J.S. 34) and that the elimination of the gateways would so increase appellant's competitive position as to be "tantamount to a new service" (J.S. 35). These were the same standards for ascertaining whether the applicant sought to provide new service which were adopted by the district court in *Emery Transportation Co.* v. *United States,* 12 Fed. Carr. Cas. 81,098 (N.D. Ill.) (1956).[2]

2. There is no merit in appellant's attack on the substantiality of the evidence supporting the Commission's finding that appellant was "not effectively competing" with existing carriers on the gateways routes (J.S. 34) and that elimination of the gateways would create "a new service" (J.S. 35). The evidence

[2] We have shown that the Commission followed the *Childress* decision. However, as the district court held (J.S. 17), it is not necessary to determine whether this decision is consistent with *Childress* as long as the Commission's standard is within its broad power of interpretation under the Act. This Court has held that, in the absence of arbitrariness, it is not the province of the courts "to inquire into the * * * consistency of [the Commission's] conclusion with those reached in similar cases." *Georgia Commission* v. *United States*, 283 U.S. 765, 775. See also *Virginian Ry.* v. *United States*, 272 U.S. 658, 663, 665–666; *ABC Freight Forwarding Corp.* v. *United States*, 169 F. Supp. 403, 405 (S.D. N.Y.).

introduced by appellant at the hearing showed that appellant's existing routes via gateways were circuitous and that a relatively small amount of traffic was handled in this manner (Exhibits 12–17). There was also evidence that elimination of the gateways would result in mileage savings as high as 74 percent (J.S. 24), from which the Commission concluded that elimination of the gateways would so materially alter the competitive relationship between appellant and the existing carriers as to create a new service (J.S. 35).* That the evidence upon which the Commission's findings were based did not include a showing by the protesting motor carriers of the volume of traffic handled by them (J.S. 10) and of the effect upon them of the grant of the appellant's application (J.S. 13) in no way obscured the fact that the appellant's proposed operations would be tantamount to a new service by it. The court below carefully reviewed the Commission's order and held that it was supported by probative evidence.

3. Although a result of the denial of appellant's application may be continued "uneconomic operations" through circuitous gateways (J.S. 9), such operations are of appellant's own making. The Com-

* In other alternate route and gateway removal cases, the Commission has found the following mileage savings to constitute a new service: 60 percent—*Chicago Express, Inc., Ext.—Tuscola, Ill.*, 79 M.C.C. 384, 386 (1959); 38 and 42 percent—*West Bros., Inc., Ext.—Alternate Routes*, 77 M.C.C. 699, 702 (1958); 49 percent—*C & H Transp. Co., Inc., Ext.—Kansas*, 71 M.C.C. 607, 609 (1957); 17 and 18 percent—*Atlantic Coast Freight Lines, Inc., Ext.—Alternate Route*, 71 M.C.C. 498, 501 (1957); 10 to 20 percent—*C & H Transp. Co., Inc., Ext.—Elimination of Texas Gateway*, 71 M.C.C. 483, 485, 486 (1957).

mission certified two separate and distinct operations, which appellant voluntarily tacked together by operating through the gateways. The appellant cannot now capitalize on the inefficiencies of operations voluntarily undertaken by it to obtain a certificate to perform a new service for which no public need has been shown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
ROBERT B. HUMMEL,
PATRICK M. RYAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
JAMES Y. PIPER,
FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission.

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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 936

YALE TRANSPORT CORP.,

Appellant.

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY TO APPELLEES' MOTION TO AFFIRM

HERBERT BURSTEIN,
Attorney for Yale Transport Corp., Appellant,
160 Broadway,
New York 38, N. Y.

LOWER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 939

YALE TRANSPORT CORP.,

Appellant.

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY TO APPELLEES' MOTION TO AFFIRM

This brief reply is intended to point out the errors in appellees' motion to affirm.

1. Appellees urge that the appeal presents "no substantial question" because the "determination of whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission" and a decision by the district court that the Commission's order was supported by an adequate factual and legal basis virtually binds this Honorable Court (M. A. 4).* It is

* The symbol "M. A." refers to the motion to affirm followed by the page number. Reference to the Jurisdictional Statement is identified by the symbols "J. S."

hardly necessary to point out that the Commission's powers are not unlimited [*Interstate Commerce Commission* v. *The New York, New Haven and Hartford Railroad Co. et al.*, 31 U. S. L. Week. 4363 (U. S. Apr. 22, 1963); *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83 (1957)] and a determination by a district court that an administrative order is based upon sufficient findings is not apodictic.

2. Appellees incorrectly contend that the Examiner followed the decisional guidelines established in *Childress-Elimination of Sanford Gateway* [61 M. C. C. 421 (1952)], when he concluded that a new service would be created by appellant. This is a piece of parologism which cannot survive a contest with the record (J. S. 33-35). Indeed, the district court recognized the departure from *Childress*, when it refused to decide whether the principles of that case were followed (J. S. 17). Consistency may not be an appropriate restraint upon viable administrative action but when the Commission departs from an established policy or principle, it must explain why [*Florida* v. *United States*, 282 U. S. 194 (1939); *Service Trucking Co.- Extension—Frozen Pies and Pastries*, 86 M. C. C. 98 (1961), (Commissioner Tucker dissenting); aff'd as modified, 88 M. C. C. 697 (1962)], and it failed to do so in this case.

At best, the Examiner's Report was a recondite exposition of a new theory which resembles but rewrites *Childress, supra*. For example, the Examiner said that appellant transported "a substantial number of less-than-truckload shipments" but the tonnage was "light"! Led into a blind alley by this semantic excursion, the Examiner then makes an inductive leap to reach the conclusory decision that mileage savings, alone, foreclosed relief because this was "tantamount to a new service"

(J. S. 34-35). Of course, appellees reject this view and rely, instead, on the equally insupportable finding that appellant was not an effective competitor despite the absence of any evidence as to the operations of appellant's competitors (M. A. 7). Surely, this is not the lesson of *Childress, supra,* nor of subsequent decisions by the Commission.

Mileage savings may indicate, but they do not determine, whether a new service is created. Thus, in *Ace Lines, Inc. Extension—Elimination of Wilmington, Ill. Gateway* [81 M. C. C. 797, 800 (1959)], the applicant combined two authorities and by using Wilmington, Illinois as a gateway (which it sought to eliminate) saved 45 miles. In all, only 58 shipments were shown for the representative period but relief was granted:

> "The evidence is convincing that applicant is actually transporting a substantial volume of the considered traffic from each of the proposed origin points by operating through Wilmington, and is an effective competitor for, if not the principal carrier of, such traffic. Applicant has shown that some economies would accrue to its benefit if it were allowed to operate over the most direct routes available. Such economies indirectly benefit the public through more efficient and economical service and thus constitute, in themselves, a showing of public convenience and necessity in the absence of any showing that applicant could institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers we conclude that the application should be granted."

In *T.I.M.E. Incorporated, Extension—Tucson* (77 M. C. C. 413, 1958), the mileage savings involved 180 miles, 4 hours of running time and an annual volume of freight of 1,938,000 pounds. In the case at bar, the comparable figures for representative operations (except in two instances) were mileage savings of less than 180 (J. S. 24) and a volume of freight, on a projected annual basis through one gateway only (New Haven) of 5,783,859 pounds (J. S. 10). In *T.I.M.E.*, supra, the Commission held that the applicant "transports a substantial volume of traffic" (77 M. C. C. at pp. 414-415) but in this case, three times as much traffic handled by appellant is called "light"! (J. S. 34). Only resort to fiction can reconcile these diametrically opposed results.

3. In the case at bar, contrary to appellees' statements (M. A. 7), there was no showing by anyone that appellant could or would institute a new service or a service so different from that presently conducted as to alter the competitive situation. The policy reason which mandates denial of relief where a service pattern is altered is the need to protect existing carriers. A service can only be "new" if it is different from what has been performed and, accordingly, changes the competitive framework. The record showed that 80% of appellant's shipments were given overnight delivery service and a gateway elimination will not alter that type of performance (J. S. 9) because there is no way to improve that kind of service nor was there any evidence that the 80% record could be improved if the relief sought were granted. Recognizing that there would be no change in the nature of the service accorded to shippers, the Examiner and the Commission put a new gloss on *Childress, supra,* by ruling that any savings in operating time which the Commission thinks excessive, condemns an application (J. S. 34-35)

even if the evidence of record shows that mileage savings will not change the character of service. To be sure, the Examiner and the Commission do propound a factitious "finding" that appellant was "not effectively competing for this traffic" (J. S. 34; M. A. 7) but the record unequivocally contradicts this alleged finding. Certainly there being no evidence of operations by protestants, the Commission had no basis upon where to measure the degree of existing competition and, of course, any prospective change. A "new service" results, classically, when next morning delivery replaces second morning delivery because of mileage savings. Thus, in *England Bros. Truck Line, Inc. Ext.—Alternate Route* (13 Fed. Carr. Cas. paragraphs 34, 528, pp. 40, 375) the Commission (Division 1) said:

> "The question whether or not applicant would be able to offer shippers an essentially different service than it now can offer them, cannot be mechanically resolved by a simple inquiry as to whether a faster service can be rendered over the proposed route. In most cases, use of an alternate route results in some reduction in transit time and thus makes possible, at least in theory, a better service from the standpoint of delivery time. The decisive factor is, necessarily, the degree of improvement in the service, rather than the improvement itself. It is true that the use of the shorter route would allow applicant to deliver shipments on the next morning after departure; however, the record shows that such first-morning service is now being accomplished, and that its advertised delivery time is next-day delivery, which service it performs on 81 percent of the shipments transported * * * Hence, it cannot be said that applicant is now unable to

offer shippers the substantially equivalent of the service offered by protestants between Kansas City and Memphis."

4. The miscellany of decisions, some of them "impossible to reconcile" suggests the need for decision by this Court. (Note *Federal Regulations of Trucking; The Emerging Critique*, 63 Colum. L. Rev. 460, 491-501, 1963).

CONCLUSION

The Motion to Affirm Should Be Denied

May 8, 1963.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Yale Transport Corp., Appellant,
160 Broadway,
New York 38, New York